LOOKING TO THE GRAVAMEN OF THE CLAIM: THE COMMERCIAL ACTIVITY EXCEPTION OF THE FSIA

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I. Introduction

The Foreign Sovereign Immunities Act (FSIA)[1] has been correctly referred to as a "statutory labyrinth,"[2] leaving U.S.

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1. Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602–11 (2012).

2. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1107 (5th Cir. 1985) (quoting Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1105–06 (S.D.N.Y. 1982)).

courts to trek through muddy waters in an attempt to answer the seemingly simple question of when to strip a foreign state of its immunity. It is a longstanding principle of domestic and international law that a state or sovereign should be free from the jurisdiction of another state's courts.[3] Today, foreign sovereignty is a well-established feature of domestic law in the United States.[4]

In 1976, Congress passed the FSIA with the goal of providing the "sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States."[5] The FSIA, like the Tate Doctrine,[6] codifies a restrictive theory of sovereign immunity by generally granting a foreign sovereign immunity from suit in the United States except in specific enumerated instances.[7] The most commonly invoked FSIA immu-

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3. *See* Republic of the Philippines v. Pimentel, 553 U.S. 851, 865 (2008) (quoting Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812)) ("The doctrine of foreign sovereign immunity has been recognized since early in the history of our Nation. It is premised upon the 'perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse.'").

4. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 610–11 (1992); *see also* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

5. Williams v. Shipping Corp. of India, 489 F. Supp. 526, 529 (E.D. Va. 1980). The FSIA creates a federal long-arm statute providing for both in personam and subject-matter jurisdiction. Grynberg v. BP P.L.C., 855 F. Supp. 2d 625, 640 (S.D. Tex. 2012). 28 U.S.C. § 1330(b) provides for personal jurisdiction for every claim where the district courts have subject-matter jurisdiction under § 1330(a). 28 U.S.C. § 1330(b). § 1330(a) in turn grants subject matter jurisdiction over "any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity." *Id.* § 1330(a).

6. Letter from Jack B. Tate, Acting Legal Advisor, Dep't of State, to Phillip B. Perlman, Acting Att'y Gen. (May 19, 1952) *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 714 (1976) ("[I]t will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.").

7. The FSIA denies sovereign immunity for nine statutory reasons set forth in §§ 1605 and 1607: 1) commercial activity with a U.S. nexus; 2) noncommercial torts in the United States; 3) taking of property located in the United States in violation of international law; 4) waiver; 5) arbitration-related matters; 6) certain rights to property in the United States; 7) certain admiralty matters; 8) counterclaims; and 9) certain acts of terrorism. 28 U.S.C. §§ 1605, 1607.

nity exception is the commercial activity exception found in § 1605(a)(2).[8] This Comment analyzes whether the Supreme Court, in light of *Saudi Arabia v. Nelson*,[9] applied the most appropriate test in *OBB Personenverkehr AG v. Sachs*[10] to determine the nexus requirement of the commercial activity exception. This Comment also attempts to decide whether the Court's narrow interpretation of the phrase *based upon* strikes an appropriate balance between the rights of those injured by the acts of governmental entities and the sovereignty of foreign states that the FSIA was enacted to protect.[11]

The commercial activity exception comprises three clauses, each providing a separate ground for a court to exercise jurisdiction over a sovereign.[12] Clause one permits jurisdiction if the plaintiff's action is "based upon a commercial activity carried on in the United States by the foreign state"; clause two permits jurisdiction if the plaintiff's action is based upon an act in the United States "in connection with a commercial activity of the foreign state elsewhere"; and clause three permits jurisdiction if the plaintiff's action is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[13] This Comment discusses the open-ended phrase *based upon* as it is used in all three clauses of the commercial activity exception. The Comment primarily focuses on the difficulties inherent in

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8. 28 U.S.C. § 1605(a)(2); De Sanchez v. Banco Cent. de Nicar., 770 F.2d 1385, 1390 (5th Cir. 1985).

9. Saudi Arabia v. Nelson, 507 U.S. 349 (1993).

10. OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015).

11. *See* Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 202 (5th Cir. 1984). In hearings held before the House Committee on the Judiciary, the Chief of the Foreign Litigation Section of the Department of Justice stressed that the long-arm feature of the FSIA will ensure that "only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small 'international courts of claims.'" He maintained that Congress did not intend the FSIA to "open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." *Id.* at 202–03 (quoting *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary on H.R. 11315*, 94th Cong. 31 (1976) (statement of Brunon A. Ristau)).

12. 28 U.S.C. § 1605(a)(2).

13. *Id.*

interpreting the meaning of *based upon* in the context of the first clause of the commercial activity exception.

II. Interpreting the Based Upon Requirement of the First Clause of § 1605(a)(2)

A. *The Elements of Clause One*

In order to establish jurisdiction under the first clause of the commercial activity exception, a court must determine whether three separate requirements have been satisfied.[14] Specifically, the claim(s) must be 1) based upon 2) a commercial activity 3) that has substantial contact with the United States.[15]

Commercial activity is defined as "activity carried on by such state and having substantial contact with the United States."[16] Congress further provides that a commercial activity may be "either a regular course of commercial conduct or a particular commercial transaction or act,"[17] to be determined by "reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[18] This general definition and its circular reasoning[19] have left the courts without a clear framework for determining the degree of connection necessary between the cause of action and the United States.

Courts follow a two-pronged approach in determining whether the claim is adequately *based upon* commercial activity with sufficient connection to the United States: 1) identifying the foreign state's particular commercial conduct on which the plaintiff's claim is based;[20] and 2) determining whether a sufficient nexus exists between the commercial activity in the

14. *See* Gould, Inc. v. Mitsui Mining & Smelting Co., 947 F.2d 218, 220 (6th Cir. 1991) (detailing each requirement of the first clause of the commercial activity exception).

15. 28 U.S.C. §§ 1603(e), 1605(a)(2).

16. *Id.* § 1603(e).

17. *Id.* § 1603(d).

18. *Id.*

19. *See* Andreas F. Lowenfeld, *Litigating a Sovereign Immunity Claim—The* Haiti *Case*, 49 N.Y.U. L. Rev. 377, 435 n.244 (1974) ("Start with 'activity,' proceed via 'conduct' or 'transaction' to 'character,' then refer to 'nature,' and then go back to 'commercial,' the term you started out to define in the first place.").

20. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 356 (1993).

United States and the gravamen of the complaint.[21] To satisfy the first prong, a court must identify the foundation of a claim—the core of the complaint.[22] To bypass immunity, the alleged commercial conduct must give rise to the plaintiff's claim; specifically, the commercial conduct, if proven, must entitle the plaintiff to relief under the plaintiff's theory of the case.[23]

Once a court has identified the particular commercial activity that forms the basis of the plaintiff's claim, it must assess whether the activity has a sufficient U.S. nexus to grant jurisdiction.[24] For the first clause, this means an activity that has substantial contact with the United States.[25] Commercial transactions that are performed only partly in the United States may still satisfy the substantial contact requirement.[26] The Supreme Court has not clarified what extent is necessary to meet the substantial contact threshold and has instead embraced a case-by-case analysis.[27] This has led to inconsistent interpretations among federal courts. For example, in *Zedan v. Saudi Arabia*, the United States Court of Appeals for the D.C. Circuit held that substantial contact requires more significant contacts with the United States than the minimum contacts standard for due process.[28] Under this reasoning, a single element of a larger commercial activity or an isolated incident will generally not suffice to meet the substantial contact threshold.[29] How-

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21. *See* EM Ltd. v. Banco Cent. De La República Arg., 800 F.3d 78, 98 (2d Cir. 2015), *cert. dismissed*, 136 S. Ct. 1731 (2016); *see also* Kensington Int'l, Ltd. v. Itoua, 505 F.3d 147, 156–57 (2d Cir. 2007).

22. *See* Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98, 107 (2d Cir. 2016) (quoting *Gravamen*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining gravamen as "[t]he substantial point or essence of a claim, grievance, or complaint.")).

23. *See Nelson*, 507 U.S. at 357.

24. *See* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1110 (5th Cir. 1985).

25. Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1603(e) (2012).

26. *See* Triple A Int'l, Inc. v. Democratic Republic of the Congo, 852 F. Supp. 2d 839, 844–45 (E.D. Mich. 2012) (citing H. R. REP. NO. 94-1487, at 17 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6615–16).

27. *Id.* at 845. The FSIA's legislative history explains that "[i]t will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States." *Id.*

28. *See* Zedan v. Saudi Arabia, 849 F.2d 1511, 1513 (D.C. Cir. 1988).

29. *See id.* at 1513–14. In *Zedan*, the court provided examples of insufficient contacts for purposes of the FSIA. The court held that a phone call

ever, some courts have held that when a foreign state, either directly or through an agent, sells a ticket to a passenger in the United States, the sale of the ticket is enough to satisfy the substantial contact requirement.[30]

B. *Case Law and the* Based Upon *Requirement*

The lack of guidance by Congress has exacerbated the inconsistent interpretation of the *based upon* requirement by federal courts.[31] Varying tests have evolved within the different circuits to reconcile the *based upon* requirement of the first clause with the nexus requirement.[32] Two lines of cases stand out: one following a loose or simple nexus standard while the other follows a significant or substantial nexus standard.[33]

In *Arango v. Guzman Travel Advisors Corp.*, the U.S. Court of Appeals for the Fifth Circuit defined *based upon* as "whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character."[34] Agreeing with the Fifth Circuit's defini-

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from a foreign state to the United States for an offer of employment or a few business meetings held in the United States with a foreign state's principle place of business being overseas were not substantial contacts. *Id.*

30. *See* Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 781 (9th Cir. 1991). *See also* Sachs v. Republic of Austria, 737 F.3d 584, 596–97 (9th Cir. 2013) (en banc), *rev'g* 695 F.3d 1021, 1029 (9th Cir. 2012), *rev'd sub nom.* OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015). In *OBB*, the Supreme Court did not address whether Sachs's purchase of the Eurail pass in the United States satisfied the substantial contact requirement. The Court did not have to decide this issue because Sachs's personal injury claims were not based upon that ticket purchase. OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 396 (2015).

31. *See* Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 199–200 (5th Cir. 1984) (explaining how the lack of consistency surrounding judicial interpretation of the first clause has resulted in varying formulations of the jurisdictional scope among federal courts).

32. *Id.* at 200–01 (providing a detailed explanation of the varying tests that have evolved to define the jurisdictional scope of the first clause, namely the literal test, the nexus test, the bifurcated literal and nexus test, and the doing business test).

33. *See id. See also* Margot C. Wuebbels, *Commercial Terrorism: A Commercial Activity Exception Under § 1605(a)(2) of the Foreign Sovereign Immunities Act*, 35 ARIZ. L. REV. 1123, 1129–30 (1993).

34. Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1379 (5th Cir. 1980).

tion, the U.S. Courts of Appeals for the Second and Seventh Circuits emphasized that the *based upon* requirement must be applied by isolating "the specific conduct that underlies the suit."[35]

In *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, the Fifth Circuit applied *Arango*'s definition of *based upon* to create a nexus test.[36] This test was supposed to determine when a claim is based upon commercial activity occurring in the United States. The *Vencedora* court rejected a narrow and literal interpretation of the first clause and held that the cause of action did not need to be directly based on the foreign state's commercial activity in the United States.[37] Rather, a nexus simply needed to exist to satisfy the *based upon* requirement of the first clause.[38] This broad interpretation is known as the simple nexus requirement.

By contrast, the U.S. Court of Appeals for the Seventh Circuit applied a significant nexus test in *Santos v. Compagnie Nationale Air France*.[39] There, the court opted for a narrow reading of the *based upon* requirement.[40] The plaintiff, U.S. citizen Miguel Santos, alleged personal injury while working at Orly Airport in Paris as a result of an Air France employee negligently driving a vehicle into a loading platform.[41] The court held that the plaintiff's injuries were not based upon Air France's commercial activity in the United States.[42] The court reasoned that there was an insufficient nexus between the injury and the conduct.[43] In fact, Santos' claim had no connection to Air France's commercial activity in the United States and was simply based on the fact that an Air France employee happened to be driving the vehicle that caused his injuries.[44]

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35. Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 150 (2d Cir. 1991). *See also* Rush-Presbyterium-St. Luke's Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 580 (7th Cir. 1989), *aff'd*, 504 U.S. 607 (1992).

36. *Vencedora Oceanica Navigacion, S.A.*, 730 F.2d at 203.

37. *Id.* at 202.

38. *Id. See also* Gemini Shipping, Inc. v. Foreign Trade Org. for Chems. & Foodstuffs, 647 F.2d 317, 319 (2d Cir. 1981).

39. Santos v. Compagnie Nationale Air Fr., 934 F.2d 890, 892–93 (7th Cir. 1991).

40. *Id.* at 893.

41. *Id.* at 891.

42. *Id.*

43. *Id.* at 894.

44. *Id.*

In *Saudi Arabia v. Nelson*, the Supreme Court clarified the nexus requirement and concluded that the *based upon* requirement mandated a significant nexus.[45]

III. *Saudi Arabia v. Nelson*: Replacing a Simple Nexus Test in favor of a Significant Nexus Test

A. *The Facts and Holding: The* Based Upon *Framework*

In *Saudi Arabia v. Nelson*, Nelson, a U.S. citizen, worked as a monitoring systems engineer at a state-owned hospital in Saudi Arabia.[46] He was recruited by the Hospital Corporation of America (HCA)—an independent corporation.[47] Nelson interviewed in Saudi Arabia but signed his employment contract with the hospital in the United States.[48] While working at the Saudi hospital, Nelson began reporting certain safety defects to hospital officials in accordance with his job requirements.[49] After several months of his reporting these defects, Saudi government agents arrested Nelson.[50] During his detainment he was tortured, beaten, deprived of food, coerced to sign a statement in Arabic without being informed of its contents, and was never notified of the reasons for his imprisonment.[51]

Following his release and return to the United States, Nelson sued Saudi Arabia and the hospital in the U.S. District Court for the Southern District of Florida.[52] The court dismissed the action and held that HCA's recruitment of Nelson did not establish a sufficient nexus as required by the first clause of the commercial activity exception.[53] On appeal, the Eleventh Circuit reversed and held that Saudi Arabia acted in a commercial capacity by recruiting and hiring Nelson and that Nelson's injuries were based upon these recruitment activ-

45. Saudi Arabia v. Nelson, 507 U.S. 349, 356–58 (1993).
46. *Id.* at 352.
47. *Id.* at 351–52.
48. *Id.* at 352.
49. *Id.*
50. *Id.*
51. *Id.* at 353.
52. *Id.*
53. *Id.* at 354–55. The District Court opined that "[a]lthough HCA's recruitment of Nelson in the United States might properly be attributed to Saudi Arabia and the hospital . . . it did not amount to commercial activity 'carried on in the United States' for purposes of the Act." *Id.* at 354.

ities which, except for the interview, took place in the United States.[54]

The Supreme Court, in an opinion written by Justice Souter,[55] reversed and held that Nelson's intentional tort claims were not based on the commercial activity of Saudi Arabia—the recruitment and hiring process—and therefore did not fall within the scope of the exception.[56] Instead, the Court held that Nelson's claims stemmed from Saudi Arabia's tortious conduct that took place after his arrest.[57] Saudi Arabia exercised the tortious conduct under its police power—a right inherently sovereign in nature—and therefore not commercial for purposes of the FSIA.[58] By so holding, the Court did not need to reach a decision on whether Saudi Arabia's recruitment and hiring in the United States satisfied the nexus requirement.[59] However, the decision carefully elaborates on how to 1) determine the core of a claim, and 2) satisfy the substantial contact requirement of the first clause.[60]

B. *The Court's Nexus Analysis in* Saudi Arabia v. Nelson

The *Nelson* Court understood the *based upon* requirement to mean "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case,"[61] or alternatively, the "gravamen of the complaint."[62] The Court distinguished the *based upon* requirement of the first clause from the *based upon* requirement of the second and third clauses by noting that the first clause does not include the phrase *in connection with*.[63] This distinction is significant since it allows for an

54. *Id.* at 355.

55. *Id.* at 351. Chief Justice Rehnquist and Justices O'Connor and Scalia joined the majority opinion. Justice White concurred in the judgment, Justices Blackmun and Kennedy authored separate opinions in which they concurred in part and dissented in part, and Justice Stevens dissented. *Id.* at 364, 370.

56. *Id.* at 358.

57. *Id.*

58. *Id.* at 361–62.

59. *Id.* at 356.

60. *See* discussion *infra* Part III.B.

61. *Nelson*, 507 U.S. at 357.

62. *Id.* (quoting Callejo v. Bancomer, S.A., 764 F.2d 1101, 1109 (5th Cir. 1985)).

63. *Id.* at 357–58. The Court explains that the second clause: "allows for jurisdiction where a suit 'is based . . . upon an act performed in the United

inference of congressional intent regarding the first clause of the commercial activity exception: by adding the phrase *in connection with*, Congress wanted courts to find a difference between a suit *based upon* commercial activity as opposed to one *based upon* acts performed *in connection with* such activity.[64] In order for the first clause to remain separate from the other two, the first clause must be interpreted to require "something more than a mere connection with, or relation to, commercial activity."[65]

Applying this reasoning, the Court held that the facts did not satisfy the *based upon* requirement of the first clause. Though Nelson's recruitment in the United States eventually led to his injuries, the recruitment process was merely *related to* the core of his claims. His claims were all *based upon* Saudi Arabia's tortious conduct. There is an insufficient nexus between the tortious acts of arresting, imprisoning, and torturing on the one hand and the recruitment and hiring of Nelson in the United States on the other.[66] A "mere connection with"[67] is not interchangeable with a nexus.[68] Even if every single element of a claim does not have to be commercial, the basis of the claim must be.

States *in connection* with a commercial activity of the foreign state elsewhere,' and the third speaks in like terms, allowing for jurisdiction where an action 'is based . . . upon an act outside the territory of the United States *in connection* with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.'" *Id.* at 357 (emphasis added).

64. *Id.* at 358.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* To uphold the relevant legislative history of the FSIA, general jurisdiction should not be authorized over foreign sovereigns. Instead, specific jurisdiction should be narrowly established for each particular commercial act that has substantial contact with the United States. Allowing a single element that does not have a significant nexus to establish jurisdiction would violate principles of international comity by dragging sovereigns to litigate in U.S. courts over a plaintiff's cause of action that does not directly arise from the sovereign's activity in the United States. *See* BP Chems. Ltd. v. Jiangsu Sopo Corp., 285 F.3d 677, 686–87 (8th Cir. 2002).

IV. *OBB Personenverkehr AG v. Sachs*: The Most Reasonable Outcome in Light of *Saudi Arabia v. Nelson*

A. *Looking to the Gravamen of the Claim*

In *OBB Personenverkehr AG v. Sachs*, respondent Carol Sachs, a California resident, purchased a Eurail Pass online from a Massachusetts-based travel agent.[69] She later used that pass to board a train in Austria operated by petitioner OBB Personenverkehr AG (OBB), an Austrian state-owned railway.[70] While attempting to board the train, she fell from the platform onto the tracks, resulting in the amputation of both of her legs.[71] She sued OBB in the U.S. District Court for the Northern District of California, where OBB moved to dismiss based on the FSIA.[72] Sachs argued that her suit was not barred by sovereign immunity and instead was subject to the first clause of the commercial activity exception: her injury and each of her claims[73] were *based upon* the Massachusetts-based travel agent's sale of the Eurail pass.[74] The District Court dismissed the suit and the en banc Ninth Circuit reversed, holding that Sachs's suit was based upon the Eurail purchase because the sale "established a single element necessary to recover under each cause of action."[75] According to the en banc court, it was not necessary for the entire claim to be based on OBB's commercial activity.[76] The sale of the pass simply needed to have occurred in the United States and bear some connection to each of Sachs's five claims.[77]

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69. OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 393 (2015).

70. *Id.*

71. *Id.*

72. *Id.*

73. Sachs asserted five causes of action for her injuries: "(1) negligence; (2) strict liability for design defects in the train and platform; (3) strict liability for failure to warn of those design defects; (4) breach of an implied warranty of merchantability for providing a train and platform unsafe for their intended uses; and (5) breach of an implied warranty of fitness for providing a train and platform unfit for their intended uses." *Id.*

74. *Id.* at 394.

75. *Id.* at 391. Sachs v. Republic of Austria, 737 F.3d 584, 599 (9th Cir. 2013) (en banc), *rev'g* 695 F.3d 1021, 1029 (9th Cir. 2012), *rev'd sub nom.* OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015).

76. *Sachs*, 737 F.3d at 599.

77. *Id.* at 599–602.

Writing on behalf of a unanimous Supreme Court,[78] Chief Justice Roberts reversed, holding that Sachs's suit was subject to sovereign immunity because it fell outside the scope of the commercial activity exception.[79]

The Supreme Court grounded its decision in *Saudi Arabia v. Nelson* due to the similarities between the two cases.[80] In *Nelson*, the Court held that the *based upon* requirement was satisfied by looking at the foundation of a claim—the gravamen of the complaint.[81] The foundation of the claim was the Saudi sovereign acts and police power abuse, not the recruitment and hiring process.[82] Applying the *Nelson* analysis, the *OBB* Court correctly explained that the foundation of the claim was the negligent conduct of the Austrian-owned OBB railway.[83] The Court noted that all of Sachs's claims "turn[ed] on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria."[84] The mere fact that the sale of the Eurail pass would successfully establish a single element of each of the claims fails the significant nexus test.[85] The Court thereby rejected a one-element approach as unnecessarily burdensome and incompatible with *Nelson*.[86]

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78. The Supreme Court's decision answered two separate issues: 1) whether, for purposes of determining when an entity is an agent of a foreign state under the first clause of the commercial activity exception, the express definition of agency in the FSIA or common law principles of agency should control; and 2) whether, under the first clause of the commercial activity exception, a tort claim for personal injuries suffered in connection with travel outside of the United States is *based upon* the allegedly tortious conduct occurring outside of the United States. *OBB Personenverkehr AG*, 136 S. Ct. at 395. This Comment only focuses on the second issue. *See* Amy Howe, *Argument Preview: Justices to Take on Sovereign Immunity in the Internet Age*, SCOTUSBLOG (Oct. 1, 2015, 3:12 PM), http://www.scotusblog.com/2015/10/argument-preview-justices-to-take-on-sovereign-immunity-in-the-internet-age/.

79. *See OBB Personenverkehr AG*, 136 S. Ct. at 393 (holding that Sachs's suit was based upon OBB's conduct and not the sale of the Eurail pass).

80. *Id.* at 395.

81. Saudi Arabia v. Nelson, 507 U.S. 349, 356–57 (1993).

82. *Id.* at 358.

83. *OBB Personenverkehr AG*, 136 S. Ct. at 396.

84. *Id.*

85. *Id.* at 395.

86. *Id.* at 396. A one-element test requires that a court "identify *all* the elements of each claim in a complaint before that court may reject those claims for falling outside § 1605(a)(2). But we did not undertake such an

Sachs's injuries were not based on the sale of the pass since "there is nothing wrongful about the sale of the Eurail pass standing alone."[87] Even Sachs's failure to warn claim failed to satisfy the *based upon* requirement. Without the existence of the unsafe boarding conditions in Austria, there would have been nothing to warn Sachs about before she purchased the pass.[88] By rejecting Sachs's failure to warn claim, the Court sought to limit the ability of plaintiffs' counsel to artfully plead an intentional tort claim that would otherwise fail a significant nexus test.[89] Plaintiffs seeking to establish jurisdiction under the commercial activity exception can almost always identify at least one wrongful act that occurred in the United States. In the interest of creating the clearest test possible, the Court insisted that the wrongful act(s) be at the core of the claim.[90]

B. *The Limited Reach of* OBB Personenverkehr AG v. Sachs

Although the *OBB* Court's decision correctly followed precedent regarding the *based upon* requirement given the facts of that case, its precedential value may be limited because it does not clearly prescribe how to interpret a case with multiple gravamens. The Court admits as much and acknowledges the potential future relevance of different types of commercial activity within the United States.[91] The Court has not faced a scenario where the gravamen of one claim is found in the United States, while the gravamen of another claim is found abroad.[92] The *OBB* decision implies that there should ideally

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exhaustive claim-by-claim, element-by-element analysis of the Nelsons' 16 causes of action, nor did we engage in the choice-of-law analysis that would have been a necessary preclude to such an undertaking." *Id.*

87. *Id.*

88. *Id.*

89. *Id.* As explained in *Nelson*, any plaintiff "could recast virtually any claim of intentional tort committed by sovereign act as a claim to failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it." Saudi Arabia v. Nelson, 507 U.S. 349, 363 (1993).

90. *OBB Personenverkehr AG*, 136 S. Ct. at 397.

91. *Id.* at n.2 (explaining that "[w]e cautioned in *Nelson* that the reach of our decision was limited . . . similar caution is warranted here. . . . we consider here only a case in which the gravamen of each claim is found in the same place.").

92. *Id.*

always be one main gravamen or core of the claim(s). Chief Justice Roberts references a letter written by Justice Holmes, who stated that the "essentials"[93] of a personal injury claim will be found at the "point of contact."[94] Here, the essentials of Sachs's injuries were in Austria.[95] However, the essentials of a claim will not always perfectly align with the place where the injury occurs.

During the oral argument, Chief Justice Roberts presented a hypothetical highlighting this concern—suppose that negligent work on airplane landing gear in New York causes injury to passengers when the plane lands in Austria.[96] This hypothetical includes multiple gravamen, yet under Justice Holmes' analysis, the core of the personal injury claims would be in Austria, the point of contact. This analysis not only oversimplifies the *based upon* requirement but also buries the actual core of the claim. The resulting point of contact may not necessarily satisfy the U.S. nexus and may not entitle a plaintiff to relief. The same plaintiff may satisfy the elements of the first clause with another gravamen that is not the point of contact. In such a case, equating the core of the claim with the point of contact would deny an otherwise deserving plaintiff his or her choice of forum. Cases with multiple gravamens support the proposition that a significant nexus interpretation is the correct reading of the substantial contact language of § 1603(e). A reading of the first clause requiring no more than a minimum contacts analysis[97] is no longer reasonable given the increasingly international nature of commercial acts.

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93. *Id.* at 397 (quoting Letter (Dec. 19, 1915), *in* HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934 at 40 (Robert Mennel & Christine L. Compston eds., 1996)).

94. *Id.*

95. *Id.* at 397.

96. Transcript of Oral Argument at 14, OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015) (No. 13-1067).

97. *See* Vencedora Oceanica Navigacion, SA v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 206 (5th Cir. 1984) (Higginbotham, J., concurring in part and dissenting in part) ("The 'substantial contact' language of § 1603(e) also supports my reading. This language appears to be drawn upon the 'minimum contacts' test of *International Shoe.* That test marks off a 'doing business' ground as involving 'instances in which the continuous corporate operations within a state [are] thought so substantial and of such nature as to justify suit against it on causes of action arising from dealings entirely distinct from these activities.' The FSIA's 'substantial con-

The *OBB* decision does not sufficiently address the potential dilemma involving multiple gravamens. Sachs's brief on the merits raises an alternative argument for the Supreme Court: that her injuries were not only based upon the sale of the Eurail pass, but were also based upon OBB's entire railway enterprise.[98] Sachs's new theory argues that by marketing and selling the Eurail pass in the United States, OBB satisfies the substantial contact requirement of the commercial activity exception.[99] The Court did not reach a verdict on this new argument because Sachs did not present it in any of her lower court proceedings.[100] The lower courts and the Supreme Court were all asked to consider whether the claims were *based upon* the sale of the Eurail pass standing alone.[101] Had Sachs not forfeited this argument, her claims may have been based upon OBB's commercial enterprise, including OBB's negligence in maintaining its railroad tracks. OBB's commercial enterprise would include agents marketing and selling the Eurail pass to potential customers worldwide. By not addressing Sachs's alternative argument, the Court did not delineate a test for when the marketing and selling of tickets, even as part of a company's course of business, fails to establish the required substantial contact with the United States. The *OBB* decision does not require such a test: all of Sachs's injuries took place abroad in an Austrian train station. *OBB*'s precedential value is therefore limited to cases where the only U.S. point of contact is a ticket sale for subsequent injuries sustained abroad.

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tact' language thus does not signal a congressional intent to enact more stringent a test than the 'minimum contacts' necessary for 'doing business' jurisdiction.") (citations omitted).

98. *OBB Personenverkehr AG*, 136 S. Ct. at 397.

99. *Id.*

100. *Id. See* Taylor v. Freeland, 503 U.S. 638, 645–46 (1992). In *Taylor v. Freeland*, the applicant raises a new argument with the Supreme Court for the first time in his opening brief on the merits. The Court explains that Supreme Court Rule 14.1(a) clearly states that only questions included in the petition for certiorari will be considered. Supreme Court Rule 24.1(a) further elaborates that a brief on the merits should not include new, additional questions or change the substance of the questions already included in the petition. *Id.* at 645.

101. *OBB Personenverkehr AG*, 136 S. Ct. at 397.

V. Conclusion

Using a significant nexus test to satisfy the substantial contact requirement of § 1605(a)(2) ensures that only the core element of an action, the gravamen of a claim, triggers jurisdiction. An isolated or remotely-related event occurring in the United States should always be insufficient to establish jurisdiction over a foreign sovereign. Congress enacted the FSIA with limited exceptions to immunity, and these limits should be respected regardless of the increasingly transnational nature of commerce and e-commerce. A narrow construction of the nexus requirement will help ensure that in an era with technological capacities virtually eliminating territorial boundaries, acquiring jurisdiction over a foreign sovereign remains the exception to the rule of sovereign immunity.